

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - X

3   RICHARD B. CHENEY, VICE                   :

4   PRESIDENT OF THE UNITED                :

5   STATES, ET AL. ,                         :

6                   Petitioners               :

7               v.                               :   No. 03-475

8   UNITED STATES DISTRICT                 :

9   COURT FOR THE DISTRICT OF               :

10   COLUMBIA, ET AL. ,                      :

11                   Respondents.            :

12   - - - - - X

13   Washington, D. C.

14   Tuesday, April 27, 2004

15                   The above-entitled matter came on for oral

16   argument before the Supreme Court of the United

17   States at 10:01 a.m

18   APPEARANCES:

19   THEODORE B. OLSON, ESQ., Solicitor General,

20               Department of Justice, Washington, D. C. ; on

21               behalf of the Petitioner.

22   ALAN B. MORRISON, ESQ., Washington, D. C. ; on behalf

23               of the Respondent Sierra Club.

24   PAUL J. ORFANEDES, ESQ., Washington, D. C. ; on behalf

25               of the Respondent Judicial Watch, Inc.

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1 P R O C E E D I N G S

2 [ 10: 01 a. m. ]

3 CHIEF JUSTICE REHNQUIST: We'll hear  
4 argument now on number 03-472 -- 475, Richard B.  
5 Cheney vs. United States District Court. General  
6 Olson?

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF PETITIONERS

9 GENERAL OLSON: Mr. Chief Justice, and may  
10 it please the Court:

11 This is a case about the separation of  
12 powers. The Constitution explicitly commits to the  
13 President's discretion the authority to obtain the  
14 opinions of subordinates and to formulate  
15 recommendations for legislation. Congress may  
16 neither intrude on the President's ability to perform  
17 these functions, nor authorize private litigants to  
18 use the courts to do so.

19 As this Court has construed the Federal  
20 Advisory Committee Act to avoid what the Court  
21 regarded and described as formidable constitutional  
22 questions, FACA does not permit the litigation and  
23 discovery the Respondents wish to pursue.

24 QUESTION: Would you say it's also a  
25 separation of powers question, Mr. Olson, to the

1 extent that it involves the ability of the courts to  
2 formulate rules to prevent them from deciding  
3 questions unnecessarily?

4 GENERAL OLSON: I'm not sure I understand  
5 the thrust of your question.

6 QUESTION: Well, you said this is a case  
7 about separation of powers. And I wanted -- I asked  
8 whether or not the authority of the courts is not  
9 also involved here, because there is a concern that  
10 we should have rules designed to prevent us from  
11 unnecessarily deciding questions.

12 GENERAL OLSON: Well, with respect to  
13 the -- I'm not sure whether you are asking a question  
14 about the jurisdiction of the Court, because that's  
15 an issue that's before the Court, or with respect to  
16 construing the Federal Advisory Committee Act to  
17 avoid the constitutional questions that are implicit  
18 in that statute.

19 We think that there is jurisdiction in  
20 this Court. We think that what the Court did in  
21 Public Citizen was make it very clear that because of  
22 the formidable constitutional questions, in fact, the  
23 Court referred to the constitutional questions in  
24 that case as undeniable.

25 The Court construed the Federal Advisory

1 Committee Act not to apply in that case. If that  
2 same rationale is applied here, the Court will not  
3 get to the constitutional question which FACA would  
4 inevitably raise if it intruded upon the President's  
5 power to obtain opinions from his subordinates, and  
6 to make recommendations to Congress with respect to  
7 legislation.

8 QUESTION: General Olson, we would also  
9 not get to it if we adhered to the firm final  
10 judgment rule which is the first hurdle that you have  
11 to overcome. You wouldn't get to the merits if there  
12 is no jurisdiction for us to review at this point.

13 GENERAL OLSON: That's true, Justice  
14 Ginsburg. This case fits squarely, we submit, within  
15 what the Court decided unanimously in the United  
16 States vs. Nixon for two reasons. In the first  
17 place, a denial of immediate review would render  
18 impossible any review whatsoever of the claims, the  
19 separation of powers claims that are being made here,  
20 because the Vice President -- and the Vice President  
21 is acting as the subordinate and surrogate for the  
22 President here. This is the President's authority.

23 QUESTION: Well, of course, in the Nixon  
24 case, the President exercised his privilege and it  
25 was overruled.

1                   GENERAL OLSON:  Yes, Justice --

2                   QUESTION:  So it's not, it's not on all  
3                   fours in that sense.

4                   GENERAL OLSON:  Well, it's not all fours  
5                   in that sense, but the principle as articulated by  
6                   the Court on pages 683 -- I mean 691 to 692.  What  
7                   the Court was concerned about there is that the  
8                   traditional contempt avenue or any aspect of what  
9                   would be required of the President of the United  
10                  States to defy a court order would be both unseemly  
11                  and would unnecessarily provoke a constitutional  
12                  confrontation.

13                  What the Court said in that case, when we  
14                  are talking about, when the Court is talking about  
15                  important separation of powers questions, the  
16                  President is in the position of having to defy a  
17                  court order, risk sanctions of some sort.

18                  QUESTION:  But you are not defying a court  
19                  order if you exercise a privilege.  Or if you assert  
20                  a privilege.

21                  GENERAL OLSON:  With respect, Justice  
22                  Kennedy, this case, the separation of powers issue in  
23                  this case goes far beyond the assertion of executive  
24                  privilege.  Executive privilege concerns itself with  
25                  particular documents or a concern over the

1 relationship that particular documents refer to. The  
2 objection here is to the process.

3 The President and the Vice President are  
4 being subjected to litigation and discovery which  
5 goes far beyond what the statute would require here.

6 QUESTION: It's essential to the  
7 Government's position, I take it, that this Court  
8 reject the de facto doctrine that was developed by  
9 the Court of Appeals.

10 GENERAL OLSON: We think, Mr. Chief  
11 Justice, that the de facto doctrine is wrong. It's  
12 inconsistent with Public Citizen, and if the Court  
13 were to construe -- find that somehow that the  
14 statute could be construed to create a de facto  
15 doctrine, which no court has ever done, finally done  
16 in connection with a case, that the case, the statute  
17 would be unconstitutional as it applied to these  
18 circumstances.

19 However, Mr. Chief Justice, we believe  
20 that the Court does not need to get there by  
21 construing the statute narrowly, as the Court did in  
22 Public Citizen, unanimously, I might say, because  
23 three of the eight justices felt that the statute, if  
24 it were construed any other way, would be  
25 unconstitutional. Construing the statute in that

1 fashion --

2 QUESTION: When you say construe it  
3 narrowly, but nonetheless, retain the de facto  
4 doctrine?

5 GENERAL OLSON: No. Not deal with it at  
6 all. I mean, the statute itself, we submit,  
7 addresses -- I think in the context of this case,  
8 Mr. Chief Justice, the statute may be construed in  
9 the context of a Presidential advisory group  
10 explicitly excluding a committee that's formed of all  
11 government employees, and as construed by the Court  
12 in that case, either -- the words used in the statute  
13 are established or utilized. As construed by that  
14 case, this commission was established by the  
15 President. It would be exempt on its face from  
16 application of FACA.

17 QUESTION: But what if it's, what if  
18 it's -- what if the manner in which it's utilized is  
19 that, in fact, outsiders, nongovernment employees,  
20 were actually given a vote, that when the committee  
21 took a vote, there were some nongovernment employees  
22 who were counted?

23 GENERAL OLSON: We submit, Justice Scalia,  
24 that that would raise very serious constitutional  
25 questions. As an antecedent to that, there was no



1 intention when Congress passed a statute to prohibit  
2 or regulate ex parte communications between the  
3 executive branch and members of the public.

4 QUESTION: Well, this is, this is more  
5 than ex parte communications. It's that the  
6 committee is in fact, as utilized, not a committee  
7 composed exclusively of government employees. All  
8 I'm saying is the people voting, the people voting,  
9 why would that be such an intrusion upon the  
10 executive? Simply to require knowledge of whether  
11 anybody that voted on the various recommendations of  
12 the commission was a nongovernment employee. Why  
13 would that be such a terrible --

14 GENERAL OLSON: Well, I'm going to, I'm  
15 going to quote from the Public Citizen decision  
16 itself, which authoritatively and specifically  
17 defined the term or utilized in a way which would be  
18 flatly inconsistent with this question that you just  
19 raised.

20 But I also want to mention, and would want  
21 to go on to say, that would require that the courts  
22 ignore the presumption of regularity which applies to  
23 the executive, particularly when the executive is  
24 performing core executive branch functions, which it  
25 clearly is in this case.

1                   But to get back to your question, the  
2 court in Public Citizen, on page 462, specifically  
3 defined what or utilized meant in that case. And  
4 defined it in this way, in order to avoid the  
5 undeniable formidable constitutional questions that  
6 would be raised if it was defined as you suggested.  
7 The Court said --

8                   QUESTION: General Olson, would you  
9 clarify why we are dealing with the merits. I  
10 thought, and correct me if I misunderstand this, that  
11 the merits will have to be resolved in the first  
12 instance by the court below. If we find that there  
13 is jurisdiction, if we agree with you, for example,  
14 that this discovery should not have been allowed,  
15 then why should we take the first view of the merits  
16 of this case?

17                  GENERAL OLSON: It seems to me in the  
18 context of this case, Justice Ginsburg, that once  
19 jurisdiction is acknowledged, the context of the  
20 case, the administrative record, which specifically  
21 contains within it the Presidential directive which  
22 created the advisory committee only to include  
23 members of the executive branch. The report of the  
24 committee, which specifically identifies as members  
25 only members of the executive branch, and the

1 affidavit or declaration that's on file from the  
2 deputy director, which said that the only  
3 participants were members of the executive branch,  
4 and the presumption of reliability, of regularity  
5 that the Court consistently, U.S. vs. Armstrong is  
6 one case, the Court consistently, absent clear  
7 evidence to the contrary, accords executive branch  
8 action --

9 QUESTION: But you would still be asking  
10 us to resolve the merits in the first instance, not  
11 to review any lower court decision because they said  
12 there ought to be discovery first.

13 GENERAL OLSON: Well, but we are  
14 submitting that the discovery itself violates the  
15 Constitution, violates FACA as properly construed.

16 QUESTION: All discovery, not -- you are  
17 not --

18 GENERAL OLSON: Yes, because --

19 QUESTION: But isn't that simply the basic  
20 argument on the merits again. The reason -- I think  
21 you're saying the reason we can't have discovery is  
22 because the whole statute is unconstitutional as  
23 applied to the President.

24 GENERAL OLSON: Unconstitutional if it --  
25 if applied in these circumstances. Now, it may be

1 construed --

2                   QUESTION: Yes. If we go -- I mean, if we  
3 do what Justice Ginsburg is trying to do, and that is  
4 get to the jurisdictional issue without passing, in  
5 the first instance, as accord in the first instance  
6 on the merits, then it seems to me that the  
7 jurisdictional question, to me at least, boils down  
8 to this. Why should we accept your position on  
9 jurisdiction when jurisdiction goes to the propriety  
10 with constitutional overtones, of course, of  
11 discovery, and we don't have the discovery order  
12 refined yet.

13                   If this case goes back or if it had indeed  
14 not been appealed in the first place, you would have  
15 been fighting with your colleagues on the other side  
16 about what specific discovery to allow. Once we knew  
17 what the District Court specifically was going to  
18 allow, we would have a fairly sharply focused  
19 question, and that arguably would be subject to an  
20 appeal regardless of the final judgment rule. But we  
21 don't have that focus yet.

22                   GENERAL OLSON: Well, there is two answers  
23 to that -- at least two, Justice Souter. In the  
24 first place, the discovery was ordered by the  
25 District Court. It may be found at pages 215 to 220.

1                   QUESTION: But you never came down -- I  
2 realize that, I have read the orders. But you never  
3 came back, or the Government never came back and  
4 said, well, that order is too broad because, and we  
5 think it could be allowed to this extent, and there  
6 was -- there was no, as I understand it, there was no  
7 process of trying to refine the discovery order down  
8 to anything beyond the generalities that we have on  
9 the record.

10                  GENERAL OLSON: Every effort was made with  
11 respect to the actions of the litigants in the  
12 District Court to refine it as much as possible. The  
13 District Court finally said this is what I order. I  
14 order the Petitioners not to file any dispositive  
15 motions. I order the Petitioners to respond to the  
16 discovery, to reply to nonprivileged discovery  
17 requests and assert executive privilege, which we are  
18 saying --

19                  QUESTION: And you did not assert any  
20 executive privilege.

21                  GENERAL OLSON: No. We did not. We did  
22 not.

23                  QUESTION: So we don't know what might be  
24 subject to executive privilege, and sustained,  
25 perhaps, and what would not be. And it's the what

1 would not be that would raise the constitutional  
2 issue that you are trying to raise. And it seems to  
3 me, until we know exactly what that is, there is a  
4 pretty good argument that the final judgment rule  
5 should not be subject to exception at this point.

6 GENERAL OLSON: Well, I think that there  
7 is a very strong case that it should be, Justice  
8 Souter. The Court of Appeals addressed this issue,  
9 too, and said, well, the District Court might have  
10 been too broad. In fact, the Circuit Court, the  
11 Court of Appeals recognized the constitutional  
12 implications and then said, but maybe that can be  
13 narrowed down, but that the Respondents should be  
14 entitled to whatever discovery they need to prove  
15 their case.

16 QUESTION: Was the District, was the  
17 District Court's discovery order unconditional?

18 GENERAL OLSON: Well, it was -- I don't  
19 know what you mean by --

20 QUESTION: Well, I mean, did it say, you  
21 know, the Government must produce thus and so, thus  
22 and so, thus and so?

23 GENERAL OLSON: Yes, it did, Mr. Chief  
24 Justice, although it did say that the Government  
25 could assert privileges with respect to burden or

1 executive privilege, and so forth. But if one looks  
2 at those discovery orders and they are in the joint  
3 appendix, they were much broader than the statute  
4 itself, broader than the relief that possibly could  
5 --

6 QUESTION: But now we are dealing with the  
7 situation at the two, the two justices, judges on the  
8 Court of Appeals both said, this is too, this  
9 discovery order was too broad. It ought to be  
10 trimmed. Now the District judge would have that  
11 message, so you could have gone back there and said  
12 see, District judge, this has to be narrowed.

13 GENERAL OLSON: Inevitably what would have  
14 happened, because what the Court of Appeals said, and  
15 this is at Petition appendix 18-A of the Court of  
16 Appeals decision is that however refined the District  
17 Court's order would be, they would be, the  
18 Respondents would be entitled to whatever discovery  
19 they needed to prove their case.

20 Now, what they need to prove their case,  
21 notwithstanding the presumption of regularity that  
22 the Court has always applied to the executive, absent  
23 clear evidence to the contrary, there is no clear  
24 evidence to the contrary here, Justice Ginsburg. All  
25 there is is a pure unadorned allegation which the

1 Respondents say they get from media reports that  
2 there were contacts, nothing beyond that.

3 But what they would need to prove, to  
4 prove their case is precisely what the District Court  
5 was going to allow them to utilize.

6 QUESTION: Well, can we get to --

7 GENERAL OLSON: In the form of --

8 QUESTION: Can we get to the jurisdiction  
9 point? Why is it that you went to -- that you are  
10 justified in going to the Court of Appeals? Because  
11 there is a new exception to the collateral order  
12 doctrine, or because you are seeking mandate?

13 GENERAL OLSON: Both, Justice Kennedy.

14 QUESTION: What is the exception? Is it  
15 something new under Cox or is it on one of the before  
16 Cox exceptions?

17 GENERAL OLSON: This fits squarely within  
18 Nixon. When the Court said to require the President,  
19 and remember, we are talking about the President as  
20 the real party in interest, to place himself in the  
21 posture of disobeying a court order, merely to  
22 trigger the procedural mechanism

23 QUESTION: We have already discussed that  
24 he did not -- the Vice President in this case did not  
25 exercise his privilege. Wasn't close to being held.



1                   GENERAL OLSON:  What we are dealing with  
2 here is the President --

3                   QUESTION:  How do you describe the general  
4 exception that you want us to have for discovery  
5 disputes in the District Courts?

6                   GENERAL OLSON:  When the --

7                   QUESTION:  When it involves the Vice  
8 President, it's different?

9                   GENERAL OLSON:  Well, it certainly does  
10 when it involves the President or the Vice President  
11 in core constitutional functions.  And U.S. vs. Nixon  
12 stands for the proposition when the President must  
13 choose between submission to an unconstitutional  
14 order, which participation in this discovery, the  
15 process of participation, having to prove every time  
16 the President consults with someone, to submit to  
17 litigation, and potentially submit to discovery, to  
18 submit to the violation of the separation of powers,  
19 or, or violate or challenge either sanctions or some  
20 order from the District Court.

21                  QUESTION:  You wouldn't have to do that if  
22 you just asserted executive privilege as to each  
23 discovery request that you thought would be  
24 burdensome.  And then if that's granted, you have no  
25 problem  And if it's denied, you immediately come up

1 on that.

2 GENERAL OLSON: Justice Breyer --

3 QUESTION: Why not do that?

4 GENERAL OLSON: We believe that it's much  
5 broader than executive --

6 QUESTION: I know that's your legal  
7 argument, and you may be right about that. But  
8 assuming you are right about that, you bring up the  
9 broader issue on an appeal from the case. See if you  
10 lose it. And as to your being right, being right I  
11 guess isn't enough to get you to appeal a discovery  
12 order if -- but maybe you can if you really need to.

13 So my question is, why did you really need  
14 to since you could have asserted executive privilege  
15 as to each individual.

16 GENERAL OLSON: Because the act of forcing  
17 the President to invoke executive privilege every  
18 time someone files a lawsuit, notwithstanding the  
19 presumption of regularity which was completely  
20 ignored here, that means that FACA would be used in  
21 every case to file a lawsuit to challenge the  
22 President and the Vice President's ability to --

23 QUESTION: Well, let me --

24 GENERAL OLSON: To obtain opinions --

25 QUESTION: Let me ask you this. At some

1 point, I think the Government made a Section 12(b) (6)  
2 motion to dismiss this suit because the statute was  
3 unconstitutional. And that was denied.

4 Now, could the Government not have sought  
5 review either under the collateral order doctrine at  
6 that time, or even by mandamus to address directly  
7 whether the statute is constitutional?

8 GENERAL OLSON: Potentially, Justice  
9 O'Connor.

10 QUESTION: Why didn't the Government do  
11 that?

12 GENERAL OLSON: Because the Government was  
13 anxious -- because there was another way to resolve  
14 this whole problem, notwithstanding the denial of the  
15 12(b) (6) motion to dismiss.

16 QUESTION: But wouldn't that have given  
17 the courts a chance to go directly to the issue of  
18 whether the statute is constitutional?

19 GENERAL OLSON: We submit that what the  
20 Government did here was try to work out the delicate  
21 constitutional problems that were involved here, the  
22 balancing of the executive's prerogative with the  
23 litigation function and that sort of thing, and to go  
24 the extra mile. I don't think the Court would want  
25 to encourage filing a mandamus or collateral order

1 appeals every time there is a denial of a motion to  
2 dismiss.

3 QUESTION: I take it, General Olson, that  
4 from the rest of your argument that traditional  
5 executive privilege doctrine would not cover all of  
6 the constitutional issues that you think exist here?

7 GENERAL OLSON: That's precisely correct,  
8 Mr. Chief Justice. The forcing of the President to  
9 submit to litigation and discovery, which if  
10 permitted in this case could be in any case  
11 comparable to it, any time advice is being sought  
12 from a citizen or from subordinates who may have then  
13 talked to citizens, notwithstanding the clear four  
14 corners of the directive when the President created  
15 the body within his own Administration from which he  
16 sought advice, every time there would be a lawsuit,  
17 every time they would say, well, Mr. President, come  
18 into court and claim executive privilege.

19 QUESTION: I see that. I see that. But  
20 that's an argument which you made in response to my  
21 question which is an argument on the merits. And I  
22 want you to focus on the fact that -- assume I agree  
23 with you on the merits. You will have a chance to  
24 make that argument on the merits, even if you lose  
25 here and if you lose the case.

1                   Now, my question is addressed to the need  
2   for an interim appeal from the discovery. And as to  
3   that, what is your response to the fact that you  
4   could get your interim appeal or at least preserve  
5   yourself from harm if you had asserted executive  
6   privilege to the individual bits of the discovery  
7   order with which you disagreed.

8                   GENERAL OLSON: There is two answers to  
9   that, one which the Chief Justice suggested in his  
10   question. Executive privilege may not have covered  
11   every scrap of paper. It would have required the  
12   President and the Vice President to spend time with  
13   documents deciding whether or not to assert executive  
14   privilege.

15                  And it is the process -- more importantly  
16   than that, it is the process itself of submitting, as  
17   it would be if someone, if the Congress had applied  
18   this statute to the Supreme Court of the United  
19   States or even to itself, and then allowed litigants  
20   to bring the Court or members of Congress into court  
21   to explain why they wouldn't produce information with  
22   respect to who they talked to.

23                  QUESTION: Well, you know better than most  
24   the dynamics -- than most attorneys, the dynamics of  
25   the discovery system I hear in your argument echoes

1 of every discovery dispute I've ever listened to.

2                   GENERAL OLSON: Yes. There are several  
3 differences, Justice Kennedy. As I said at the very  
4 beginning, this discovery dispute involves bringing  
5 the President and the Vice President of the United  
6 States into court to defend themselves with respect  
7 to textually committed obligations and  
8 responsibilities that they have under the  
9 Constitution.

10                   Every other discovery dispute that I have  
11 experienced, and I submit this Court has experienced  
12 except for perhaps U.S. vs. Nixon, maybe another  
13 case, did not involve those circumstances. This is  
14 at -- this puts the President, in order to challenge  
15 the constitutionality of a process that's invasive to  
16 fundamental Presidential prerogatives and  
17 responsibilities into court to defend himself,  
18 notwithstanding the questionable constitutionality of  
19 the statute that triggers it, that mandamus may not  
20 be brought against the Vice President which is the --  
21 the Federal Advisory Committee Act, it's worth  
22 mentioning, does not create a private right of  
23 action. The APA did not create a right of action  
24 against the Vice President here.

25                   So the litigants in this case, not having

1 a right to even bring this case under the statute,  
2 then sought mandamus, it's important to mention.

3 QUESTION: Well, then why did the  
4 Government turn over 36,000 pages of paper from the  
5 agencies that were also a part of this action if the  
6 whole thing is so misguided, if the application of  
7 this Act violates the separation of powers, why did  
8 the Government respond to the request for information  
9 from the agencies?

10 GENERAL OLSON: There are several answers  
11 to that. One, the agencies occupy a different  
12 statute under the APA. They occupy a different  
13 position under the Freedom of Information Act. And  
14 therefore, the obligations were different with  
15 respect to the President's core function. Arguments  
16 --

17 QUESTION: But those documents that were  
18 turned over were, as I recall, documents that would  
19 have been available under FOIA, is that right?

20 GENERAL OLSON: Yes, Mr. -- Justice  
21 Scalia, they would have been arguably available under  
22 FOIA, and they were produced under FOIA.

23 QUESTION: But you didn't get, you didn't  
24 make the argument that no discovery, you are very  
25 clear about that, no discovery is appropriate under

1 this statute. And yet you didn't, whether -- whether  
2 the information that was turned over could have been  
3 gotten under FOIA, this wasn't a FOIA suit.

4 GENERAL OLSON: There was more than one  
5 action, Justice Ginsburg. There were several FOIA  
6 actions brought against the various different  
7 departments.

8 QUESTION: Well, specifically, these pages  
9 that have been previously disclosed to other  
10 requesters under FOIA. The request in this case,  
11 wasn't it made to them under the FACA?

12 GENERAL OLSON: Yes. But the documents  
13 having already been produced and made available to  
14 the public under FOIA, it seemed to the government  
15 that would be foolhardy and unnecessarily  
16 confrontational and would serve no purpose whatsoever  
17 to withhold producing another set of those documents.  
18 Again, this is effort --

19 QUESTION: General Olson, would you  
20 clarify one thing for me? Were these documents  
21 produced by agencies or were they produced by the  
22 energy policy group.

23 GENERAL OLSON: They were produced by  
24 agencies.

25 QUESTION: So there has been no discovery



1 at all from the policy group, and you claim, of  
2 course, that they are totally exempt under the plain  
3 language of the statute.

4 GENERAL OLSON: Yes. And Mr. Chief  
5 Justice, if I may reserve the balance of my time.

6 QUESTION: Very well. Very well, General  
7 Olson. Mr. Morrison, we'll hear from you.

8 ORAL ARGUMENT OF ALAN B. MORRISON  
9 ON BEHALF OF RESPONDENT SIERRA CLUB

10 MR. MORRISON: Mr. Chief Justice, and may  
11 it please the Court:

12 The threshold question before this Court  
13 is whether the Court of Appeals correctly ruled that  
14 it lacked jurisdiction over Petitioners' attempt to  
15 obtain interlocutory review of the District Court's  
16 order.

17 In seeking review in this Court,  
18 Petitioners paint the picture of having been backed  
19 into a corner. They claim that if they do not obtain  
20 immediate appellate review that they will lose all  
21 meaningful opportunity to obtain review of the legal  
22 positions that they have taken in the District Court.

23 The basis for this claim, as the Solicitor  
24 General said, is United States against Nixon. The  
25 Court of Appeals correctly distinguished that case,

1 and said that under neither mandamus or the  
2 collateral order was review proper.

3 The Petitioners --

4 QUESTION: The Court of Appeals based  
5 that, as I recall, on the fact that in Nixon,  
6 executive privilege had been asserted, right?

7 GENERAL OLSON: They certainly made that  
8 observation, but that was not the only reason relied  
9 upon by the Court of Appeals. There is some question  
10 as to the extent to which the Court of Appeals  
11 opinion can be read in that regard. We do not rely  
12 on the fact that executive privilege was not claimed  
13 because here the Government's position is that no  
14 discovery of any kind whatsoever, other than the  
15 previously produced documents, is available here.

16 QUESTION: I'm surprised to hear that. I  
17 was, I was going to talk to you about executive  
18 privilege, because I thought that your briefs did  
19 rely on the fact that executive privilege was not  
20 claimed, and that doesn't seem to me a very  
21 significant factor.

22 MR. MORRISON: I thought I had been pretty  
23 clear in my brief saying that executive privilege was  
24 certainly something that could be claimed down the  
25 road. And we certainly -- the District judge had not

1 precluded that from happening. But as far as we were  
2 concerned --

3 QUESTION: It should make no difference to  
4 the outcome of this.

5 MR. MORRISON: It makes no difference. It  
6 makes no difference.

7 QUESTION: But there is an interim  
8 position in which one would say, well, it makes a  
9 difference to this extent, that until the executive  
10 privilege has been claimed and has been ruled upon,  
11 the extent of -- to which they have a plausible  
12 separation of powers argument is not clear.

13 I mean, we could take that position, I  
14 take it, you would agree?

15 MR. MORRISON: Yes. That would require  
16 accepting the notion that -- that everything else  
17 that they can -- they can refuse to turn over  
18 everything else, which is essentially their position  
19 here. The Solicitor General's brief is very clear,  
20 no discovery, period, in this case.

21 QUESTION: It would also require  
22 acceptance of the position that executive privilege  
23 is a definable doctrine only applicable to certain  
24 matters, and that it is, it is the function of this  
25 court to decide what it can be asserted for and what

1 it can't be asserted for. And that is not my view of  
2 executive privilege.

3 I think executive privilege means whenever  
4 the President feels that he is threatened, he can  
5 simply refuse to comply with a court order. And the  
6 same thing with Congress. And it ends up in a, you  
7 know, a struggle of the two branches. I don't view  
8 that as some legal doctrine that enables him to  
9 withhold certain documents.

10 He is, he has the power as an independent  
11 branch to say, no, this intrudes too much upon my  
12 powers, I will not do it. And after that, it's a,  
13 it's a struggle between two branches. And if you  
14 view executive privilege that way, forcing him to  
15 assert executive privilege is really pushing things  
16 to an extreme that should not very often occur in  
17 this Republic.

18 MR. MORRISON: Well, leaving aside the  
19 question of the interpretation of the United States  
20 against Nixon as to whether that decision agrees with  
21 Your Honor's interpretation, we don't have to get to  
22 that issue in this case, and -- and the --

23 QUESTION: I don't want to delay this.  
24 But to me this is important. Assume that their  
25 interpretation of the statute is completely right.

1 Assume that.

2 MR. MORRISON: Yes.

3 QUESTION: I know you don't want to, but  
4 for argument's sake, then what they are really asking  
5 for is a separate exception from the collateral  
6 order. I mean, and a separate exception that allows  
7 them, the Vice President and the President, and  
8 nobody else, to take an appeal from discovery.

9 Now, executive privilege in my mind came  
10 in by asking, well, shouldn't they at least have to  
11 assert that it's that kind of imposition upon the  
12 President's office prior to being able to carve out,  
13 under whatever name, a separate exception that would  
14 permit an appeal.

15 MR. MORRISON: I don't read the  
16 Government's brief as being that narrow. But to the  
17 extent that what they are saying is that they have  
18 some kind of special immunity from discovery, it  
19 would, as Justice O'Connor suggested earlier, have  
20 been perfectly apparent the day of July 11th when the  
21 court denied the motion to dismiss, and ordered that  
22 discovery is going to take place. That that was the  
23 time in which the Government should have taken an  
24 appeal if they claimed some sort of immunity like --

25 QUESTION: What kind of a --

1 QUESTION: Mr. Morrison --

2 QUESTION: You can't appeal from, you  
3 can't appeal from the denial of the motion to  
4 dismiss. That's really interlocutory.

5 MR. MORRISON: Well, Your Honor, but --  
6 the notion that there is a special kind of immunity  
7 from discovery of the President and Vice President, a  
8 situation like this which is what I understand their  
9 argument to be, that's the functional equivalent of  
10 an immunity defense for which there is an exception  
11 under the collateral order rule. I disagree with the  
12 merits of that, but if that's their argument, that's  
13 when they should have taken the appeal.

14 QUESTION: Are you saying --

15 QUESTION: I wonder about that. I can see  
16 you coming up here and saying, everyone knows that  
17 the motion to dismiss was denied is not  
18 interlocutory. There has been no discovery yet.  
19 There's been no order. They haven't been heard. I  
20 can hear that.

21 MR. MORRISON: But nothing has happened of  
22 any legal significance in the case from that time on.  
23 The Solicitor General said the Government was trying  
24 to work things out.

25 QUESTION: Discovery order. That's

1 significant. The mere denial of the motion to  
2 dismiss did not automatically determine that there  
3 would be a discovery order. The court, the court  
4 might have found, in accordance with the arguments of  
5 the Government, that discovery would be  
6 inappropriate.

7 MR. MORRISON: Your Honor, with all  
8 respect --

9 QUESTION: And so that is a new injury to  
10 the, to the executive which they are trying to bring  
11 up here.

12 MR. MORRISON: With all respect, Your  
13 Honor, if you read the District Court's opinion, the  
14 principal grounds on which the District Court refused  
15 to dismiss the case was that discovery was required  
16 both with respect to the de facto officer issue and  
17 with respect to --

18 QUESTION: Ordinarily, that would be  
19 summary judgment, not motion to dismiss. Motion to  
20 dismiss just deals with the pleadings. You are not  
21 talking about discovery at that stage.

22 MR. MORRISON: Well, the Government, Your  
23 Honor, had offered in evidence the Executive Order  
24 creating the task force and a copy of the final  
25 report. The Knutson affidavit did not come in until

1 three months later.

2 QUESTION: Then why wasn't that the end of  
3 the case? Because as I understand it, discovery is  
4 just what you want at the end of the case.

5 MR. MORRISON: No, Your Honor.

6 QUESTION: What relief can you get if you  
7 win the lawsuit?

8 MR. MORRISON: Well, if Your Honors will  
9 look --

10 QUESTION: No. Tell me what relief you  
11 can get if you win the lawsuit?

12 MR. MORRISON: We can get a declaration  
13 that it was -- that de facto has to apply. We then  
14 get access to all the drafts.

15 QUESTION: So you get discovery.

16 MR. MORRISON: No, Your Honor. What we  
17 get -- some of the things we would have gotten --

18 QUESTION: You get more discovery, or what  
19 did you get if you win the lawsuit? That's the thing  
20 I hadn't really been understanding.

21 MR. MORRISON: We get copies of all the  
22 papers that were exchanged in the entire advisory  
23 committee process.

24 QUESTION: Have you not asked for those in  
25 discovery?



1                   MR. MORRISON: We have asked for  
2 document -- for discovery requests which the  
3 Government contends are very broad and could include  
4 some of those things. Our discovery plan --

5                   QUESTION: And are they right?

6                   MR. MORRISON: They could be interpreted  
7 as being right, but not in light of what the District  
8 Court said in his order denying the motion to  
9 dismiss. He said, we are going to have very narrow,  
10 tailored discovery designed to find out first and  
11 foremost is the de facto officer applicable. If you  
12 look at our plan of discovery, which is in the joint  
13 --

14                  QUESTION: What is this de facto officer?  
15 Where does that come from?

16                  MR. MORRISON: It comes from a case that  
17 was decided in the D.C. Circuit in 1993.

18                  QUESTION: It did not involve this  
19 particular exception from the FACA, though.

20                  MR. MORRISON: Yes, it did, Your Honor.

21                  QUESTION: It did not involve -- it did  
22 not involve a committee composed entirely of  
23 government employees.

24                  MR. MORRISON: Oh, yes, it did, Your  
25 Honor. It was alleged that -- the first place, the

1 Hillary Clinton task force was composed entirely of  
2 government employees and the working subgroups were  
3 also composed entirely of government employees. The  
4 first question was, was the First Lady a government  
5 employee.

6 QUESTION: Yes. I understand. But the --  
7 as to the working groups, they were found not to be  
8 government employees?

9 MR. MORRISON: No, Your Honor. They were  
10 found sufficiently unclear that the Court of Appeals  
11 sent the matter back for discovery.

12 QUESTION: And they were defined, they  
13 were identified in the order appointing the  
14 committee, the working groups. Do you contend that  
15 any of the people named in the order appointing this  
16 committee are not the people they purport to be?

17 MR. MORRISON: Not in the order appointing  
18 the committee, Your Honor. But we do contend that  
19 the subgroups --

20 QUESTION: That people not named in the  
21 order are really members.

22 MR. MORRISON: Which were specifically  
23 authorized --

24 QUESTION: Which is different from that  
25 other case.

1                   MR. MORRISON: It is arguably different.  
2 But as Justice Ginsburg suggested earlier, since the  
3 Court of Appeals was the one who created this  
4 doctrine to begin with, it would seem inappropriate  
5 for this Court to try to distinguish this case from  
6 that one on the basis of when we, A, don't have a  
7 record, and B, when the Court of Appeals had never  
8 been allowed to pass on that particular issue.

9                   QUESTION: That's a rather strange  
10 doctrine, that we can't tinker with what the Court of  
11 Appeals has done, even though we disagree with it.

12                  MR. MORRISON: No. It hadn't done  
13 anything, Your Honor. It has not ruled on that  
14 doctrine in this case at all. It hasn't reached the  
15 merits. The Court of Appeals decided nothing but  
16 jurisdiction.

17                  QUESTION: And so you say that we then are  
18 prohibited from saying the Court of Appeals de facto  
19 doctrine is wrong?

20                  MR. MORRISON: I didn't say prohibiting,  
21 Your Honor. I said in the exercise of your  
22 discretion, it would be appropriate to allow the  
23 Court of Appeals in the first instance to pass on it.

24                  Judge Randolph, by the way, Justice  
25 Stevens, thought in his dissenting opinion that the

1 only way he could distinguish the two cases was to  
2 overrule the prior decision. He may or may not be  
3 right, but it suggests to me --

4 QUESTION: Well, why isn't it wrong? Why  
5 isn't, why isn't the Court of Appeals wrong on that,  
6 the argument being that this is not a discovery  
7 statute. This is not an ex parte communications  
8 statute. This is not a Freedom of Information Act  
9 statute. This is a blue ribbon committee statute.

10 MR. MORRISON: No, Your Honor --

11 QUESTION: And if you turn it into the  
12 latter, you will stop --

13 MR. MORRISON: It is partially --

14 QUESTION: -- you will stop every --  
15 you'll stop every lower level official in government  
16 when he is creating legislative policy from getting  
17 on the phone and calling up whoever he pleases. You  
18 understand that argument. I want your response.

19 MR. MORRISON: All right. Two responses.  
20 First, to some extent, it is an open government  
21 statute because part of the relief under FACA is  
22 getting access to all the documents that the  
23 committee prepares, including its minutes.

24 Second is that this statute does not  
25 apply, except to committees. A committee under the

1 Public Citizen case requires a substantial level of  
2 formality. We concede that both this committee and  
3 the Executive Office of the President and anyone else  
4 can call anyone they want at any time without  
5 triggering FACA. Only if you have a formalized  
6 committee and if you bring people in to participate  
7 in the same manner as other committee members --

8 QUESTION: That would require voting.

9 MR. MORRISON: Not necessarily, Your  
10 Honor.

11 QUESTION: I have -- I have always been  
12 puzzled by that in your briefs, to participate in the  
13 same manner as other committee members. It seems to  
14 me the essence of being a committee member is having  
15 a vote in the outcome. So it seems to me the only  
16 discovery you would need is discovery as to whether  
17 anybody who was not a government employee voted.

18 MR. MORRISON: That, Your Honor, I suggest  
19 is a question of law as to whether voting is  
20 required, but we believe that if outsiders  
21 participated in the marking up of drafts, they had  
22 input into the drafts, particularly at the subgroup  
23 level, even though they had no formal vote --

24 QUESTION: Why is that? If I bring  
25 somebody else from my agency with me, I expect all of

1 these cabinet members didn't come to the meetings  
2 alone. They certainly had assistants with them  
3 Were those assistants members of the committee?

4 MR. MORRISON: They were --

5 QUESTION: Certainly not.

6 MR. MORRISON: They did lose the  
7 exception, Your Honor, because they were full-time  
8 government employees.

9 QUESTION: I'm not asking whether they  
10 lost the exception. I'm asking whether they were  
11 members of the committee, and the answer has to be  
12 no. Now, suppose I bring instead of another  
13 government employee with me to give me advice, I  
14 bring a private individual with me to give me advice.  
15 Suddenly, that private member becomes -- private  
16 individual becomes a member of the committee even  
17 though a government agency member --

18 MR. MORRISON: It is certainly a plausible  
19 interpretation, Your Honor.

20 QUESTION: Not plausible to me.

21 MR. MORRISON: Well, the statute says the  
22 exception is composed of, wholly composed of  
23 full-time government employees. Congress was well  
24 aware of this problem and it decided that it wanted  
25 to have a very narrow exception. At least it's an

1 arguable basis and we are now here on interlocutory  
2 appeal without any facts in the record whatsoever as  
3 to how these committees operated, how the subgroup  
4 operated. They may have had a vote at the subgroup  
5 level.

6 QUESTION: What do you say about the  
7 presumption that high officials of the government  
8 obey the statutory provisions that they are supposed  
9 to follow?

10 MR. MORRISON: Well --

11 QUESTION: You don't have any information  
12 and belief that the people who are said to have been  
13 appointed were really not appointed, do you?

14 MR. MORRISON: They were appointed. If I  
15 may, Your Honor, a quote from the staff director's  
16 affidavit, which appears in the, in the joint  
17 appendix on page 76. He admits, and the Government  
18 admits, that there were substantial numbers of  
19 meetings between outside people and the task force.

20 The question is what happened at those  
21 meetings, and that's what we seek discovery. This is  
22 not simply an allegation. The General Accounting  
23 Office --

24 QUESTION: But that's all you would get if  
25 you won the suit, and it goes back to Justice

1 Stevens' question. Isn't the posture of this case  
2 one in which what happens at the end of discovery if  
3 you prevail and get discovery is substantially the  
4 same as if you won the suit.

5 MR. MORRISON: Your Honor, we would get  
6 properly reined in discovery, as the District Court  
7 understood it, we would get the basic information  
8 about who went to the meetings, who had access to the  
9 drafts, whether anybody had the right to vote. At  
10 that stage of the proceeding, that's all the  
11 discovery we think we are entitled to.

12 QUESTION: Do you think those are fairly  
13 concluded within the separation of powers privilege  
14 that the Government is asserting?

15 MR. MORRISON: I do not think that the  
16 Government has any right to withhold that kind of  
17 information in this kind of case. And if the  
18 Government makes --

19 QUESTION: But that's, but that's the  
20 issue.

21 MR. MORRISON: Yes. And if the Government  
22 asserts that it has the right to withhold that  
23 information, it may continue to assert that right.  
24 The District Court will then proceed under Rule 37,  
25 enter an order against it. It can then take an



1 appeal from a final judgment and the question --

2 QUESTION: Only if the District judge  
3 enters a default judgment, but that's just one of  
4 many options. The District judge isn't required to  
5 take that --

6 MR. MORRISON: No. That is correct. And  
7 get -- the question is, should we try to anticipate  
8 what the District Court, District judge will do.

9 QUESTION: Thank you, Mr. Morrison.  
10 Mr. Orfanedes, we'll hear from you.

11 ORAL ARGUMENT OF PAUL J. ORFANEDES  
12 ON BEHALF OF RESPONDENT JUDICIAL WATCH, INC.

13 MR. ORFANEDES: Mr. Chief Justice, and may  
14 it please the Court:

15 Judicial Watch submits there was no  
16 jurisdiction in the Court of Appeals to review the  
17 District Court's discovery orders, but assuming for  
18 purposes of argument that there was jurisdiction, we  
19 respectfully submit that the District Court properly  
20 denied Petitioners' motion to dismiss, both as a  
21 matter of statutory construction and consistent with  
22 Circuit precedent and separation of powers.

23 QUESTION: Well, that surely is one thing  
24 that's not before us, is it, is the District Court's  
25 denial of the motion to dismiss?

1                   MR. ORFANEDES: Well, no --

2                   QUESTION: I mean, it's not appealable.

3                   MR. ORFANEDES: That's correct. The  
4 Government is arguing, however, that the discovery  
5 that the District Court did order should not have  
6 been ordered because of the underlying merits of the  
7 motion to dismiss is my understanding of the  
8 Government's argument. We submit that that's a --

9                   QUESTION: They are arguing that it's not  
10 before us -- what they are arguing is that this  
11 statute doesn't apply, so therefore there was no  
12 discovery. The statute isn't one under which you can  
13 go behind the certification of the President, the  
14 Vice President, et cetera. We both read their  
15 briefs.

16                  MR. ORFANEDES: I think that's  
17 indistinguishable from arguing --

18                  QUESTION: Okay. Well then go ahead and  
19 make the argument.

20                  MR. ORFANEDES: If you could allow me to  
21 proceed. The District Court ordered discovery  
22 because it believed that it was necessary in order to  
23 avoid the constitutional issues that the Government  
24 is raising in their briefs. In denying the motion,  
25 the District Court properly applied what was Circuit

1 precedent at the time and is Circuit precedent, the  
2 AAPS case, allowing for this de facto membership  
3 doctrine that we have talked about.

4 The District Court thought that if  
5 discovery yielded information that would show there  
6 were no, there was no involvement of private  
7 individuals in the task force, then there would be no  
8 reason, no reason to even reach the constitutional  
9 issues.

10 QUESTION: Involvement of private  
11 individuals in the task force does not equate with  
12 membership of private individuals in the task force,  
13 and I wonder what your view is about the question  
14 that I asked to Mr. Morrison. What, what is it that  
15 makes you a de facto member? It surely can't be just  
16 sitting there next to somebody else who is even at a  
17 full committee meeting. It can't be sitting next to  
18 the cabinet member.

19 MR. ORFANEDES: I think the court in the  
20 AAPS case, that the District Court was relying on,  
21 and that the Circuit Court was also --

22 QUESTION: Yes. Well, that case may be  
23 wrong. What is it that makes you de facto member?  
24 What -- I assume it's the same thing that makes you a  
25 member, that is the power to determine the action the

1 committee will take. That is the power to vote.

2 MR. ORFANEDES: I think it's not looking  
3 just at voting, but whether or not there is anything  
4 that functionally distinguishes the members, the de  
5 facto members from the actual members.

6 QUESTION: There is. The vote. Let's  
7 assume that's the only thing that distinguishes them,  
8 the vote. Isn't that enough?

9 MR. ORFANEDES: It could be a vote. But  
10 there could also be -- it could also be more than  
11 that, in this particular instance --

12 QUESTION: If it's more than that, you are  
13 not talking about de facto members. You are talking  
14 about de facto participants, and that's a different  
15 --

16 MR. MORRISON: In this particular  
17 instance, there was one allegation we set forth in  
18 our complaint of policy recommendations that were  
19 conveyed to the Vice President and those  
20 recommendations did end up mirroring recommendations  
21 that were --

22 QUESTION: Exactly. Now, their problem  
23 with your interpretation of the statute, I take it,  
24 is the following. Forget the Vice President. You  
25 are Assistant Secretary of Antitrust.

1                   MR. ORFANEDES: That's correct.

2                   QUESTION: You are Assistant Secretary of  
3 HHS in charge of drug policy. You are trying to  
4 develop a legislative proposal. Every staff person  
5 in the Congress, given such a task, would phone  
6 everyone in sight who knows about it outside the  
7 Congress to try to develop sound proposals.

8                   And if it's a serious matter, they'd have  
9 50 meetings with everybody under the sun. And if you  
10 assigned the same thing, try to do the same thing  
11 under your interpretation of the Act, every one of  
12 those outside people could be hit with a discovery  
13 order, what meetings did you go to, what did you say,  
14 what did you do.

15                  And their final point is that Congress  
16 could not possibly have intended in this statute to  
17 have created that circumstance, putting government in  
18 a cocoon when it develops legislative policy. Now, I  
19 have overstated what they said, but I'm trying to get  
20 a response from you as to what I take is their basic  
21 point.

22                  MR. ORFANEDES: I think that's correct,  
23 Justice Breyer. I don't think --

24                  QUESTION: Well, you don't think it's  
25 correct.

1                   MR. ORFANEDES: I don't think -- I don't  
2 think Congress would have created such a statute, and  
3 I don't think they did create such a statute.

4                   QUESTION: Cause.

5                   MR. ORFANEDES: The case law that has  
6 interpreted the statute and the statute themselves  
7 requires a certain degree of formality, structure and  
8 continuity to an advisory committee before, before  
9 the requirements of the statute begin to apply.  
10 Circuit Court precedent, including the Nader vs.  
11 Baroody case, that I think all the parties have cited  
12 in their brief held exactly that. That there has to  
13 be -- there cannot be ad hoc committee meeting or ad  
14 hoc committee members.

15                  QUESTION: Explain the degree of formality  
16 that you think triggers the statute.

17                  MR. ORFANEDES: Well, certainly there has  
18 to be an establishing document, according to FACA. I  
19 think there has to be some degree of understanding of  
20 what the membership of the committee is going to be.  
21 There talks about an end point to the committee as  
22 well.

23                  QUESTION: The Attorney General of the  
24 United States turns to the head of the Antitrust  
25 Division and says I want a legislative proposal about

1 Webb-Pomerene acts. You get together with your  
2 counterpart at State, create an interagency task  
3 force and give me a document, and he announces the  
4 whole thing in a public speech. Now, do we have the  
5 application, in your opinion, of FACA that would  
6 trigger the questions I mentioned?

7 MR. ORFANEDES: That, that may trigger the  
8 questions that we made. And I think there is one  
9 thing that's important about this particular  
10 committee, and the document that established it.  
11 It's a January 29th memorandum from the President.  
12 It's in the appendix at 157, I believe.

13 And in that document, the Vice President  
14 was given the discretion to create subordinate  
15 working groups. There is nothing in that document  
16 that limits subordinate working groups to consisting  
17 only of private employees.

18 QUESTION: If the interagency task force  
19 creates the FACA situation in your view, imagine that  
20 I have repeated my first question, but simply applied  
21 it to interagency task forces. If you remember my  
22 first question, it had to do with the cocoon.

23 MR. ORFANEDES: Sorry.

24 QUESTION: All right. Now, what is your  
25 response?

1                   MR. ORFANEDES: I think again what becomes  
2 important is the membership of that task force. And  
3 if that, if the idea behind creating that task force  
4 allowed for, in the AAPS case, outside consultants or  
5 consultants of undetermined origin, in this instance  
6 subgroups, without any limitation as to whether or  
7 not they would be Federal employees or not Federal  
8 employees, in that instance, the requirements of the  
9 statute could be triggered.

10                  QUESTION: Those subgroups would report to  
11 the full committee, I assume, they would not have any  
12 dispositive authority over what the report of the  
13 committee says, would they?

14                  MR. ORFANEDES: Well, there was nothing in  
15 the originating document that described who those  
16 subgroups would report to.

17                  QUESTION: Well, they are called  
18 subgroups, aren't they?

19                  MR. MORRISON: That's whether or not --

20                  QUESTION: That seems to indicate that  
21 they are under somebody. And I gather what they are  
22 under is the committee.

23                  MR. ORFANEDES: It could very well be  
24 whether they reported to the committee as a whole or  
25 to the executive --



1                   QUESTION: Well, that's fine. I don't  
2 care who they report to. They are not the committee.

3                   MR. ORFANEDES: They are not the  
4 committee, but FACA includes within its definition of  
5 an advisory committee any subgroups or working groups  
6 of a committee.

7                   QUESTION: Well, if the, if the statute  
8 requires disclosure of all these things, at the end  
9 of the day, as a final order, and discovery, when  
10 they are hit with a discovery order, it gives them  
11 all the same information, why isn't the Government  
12 right, that this really is the essence of the suit  
13 and we should hear the merits of it now.

14                  MR. ORFANEDES: I don't think it is the  
15 essence of the suit. I think the appellate court  
16 gave some strong advice to the District Court to  
17 limit discovery to two points, really. Number one,  
18 being the involvement, whether there were private  
19 individuals involved.

20                  QUESTION: I don't know how the Court of  
21 Appeals --

22                  MR. ORFANEDES: -- and to what extent --

23                  QUESTION: -- can give any advice at all  
24 if it says it has no jurisdiction or the case is  
25 improperly before it.

1                   MR. MORRISON: Well, I think -- and also a  
2 significant point to be considered in that regard is  
3 that the Government did not object to the scope of  
4 this, of the discovery that it was -- as it was  
5 served. They had the opportunity, they had every  
6 opportunity to submit particularized objections,  
7 including privileges, but not just privileges, also  
8 objections as to scope, relevance, materiality. The  
9 usual long litany of discovery objections that any  
10 party is able to. They declined that opportunity.

11                   The District Court was very careful. I  
12 think he bent over backwards in inviting them to  
13 assert objections on several occasions. They chose  
14 not to do so. So for them to come back --

15                   QUESTION: Suggesting that they -- they  
16 consented to the discovery, but just they did not  
17 make specific objections?

18                   MR. ORFANEDES: They did not make specific  
19 objections. No. I'm not saying they consented to  
20 it. They were, they were clear in their objections  
21 to any discovery whatsoever, discovery that the  
22 District Court felt it needed as a means of  
23 constitutional avoidance in order to determine, first  
24 of all, whether the statute applies. And secondly,  
25 in order to narrow any constitutional issues that it

1 might have to consider if the statute did apply.

2 QUESTION: In any case, they did not avail  
3 themselves of the opportunity that the Court of  
4 Appeals has clearly given them now to whittle that  
5 order down.

6 MR. ORFANEDES: That's correct. They have  
7 not.

8 QUESTION: But you are -- am I correct in  
9 thinking your case in the District Court was just a  
10 mandamus action, right? There is no cause of action  
11 under the statute. And so in order to establish  
12 relief on mandamus, you have to show a clearly, clear  
13 right to relief and jurisdictional defect, something  
14 along that kind. You don't normally file a mandamus  
15 action and then get discovery to see whether you are  
16 entitled to mandamus.

17 MR. ORFANEDES: Justice Stevens, we had  
18 actually several different counts in our complaint,  
19 which included, first of all, we did assert a count  
20 under FACA. That was dismissed. We also asserted a  
21 --

22 QUESTION: The FACA doesn't create a  
23 private cause of action.

24 MR. ORFANEDES: That was ultimately the  
25 basis for the dismissal.

1                   QUESTION: That's why it was dismissed.

2                   MR. ORFANEDES: But we also had an -- an

3 APA claim And then ultimately --

4                   QUESTION: But you don't -- that also has

5 no merit because the Vice President is not an agency,

6 and neither is the group.

7                   MR. ORFANEDES: Well, the reasoning behind

8 the APA claim --

9                   QUESTION: The only viable claim you had

10 was the mandamus claim, as I understand it.

11                  MR. ORFANEDES: Well, the APA claim is

12 continuing with respect to the agency defendants.

13 The heads -- I shouldn't say the agency defendants.

14                  QUESTION: And they have given you

15 discovery you asked for, if I understand it?

16                  MR. ORFANEDES: Actually, they have --

17                  QUESTION: It's only the group itself that

18 refuses to give any discovery. And if I understand

19 their position, if we give you discovery, that's just

20 the same as giving you a victory in the lawsuit.

21                  MR. ORFANEDES: The agency defendants have

22 given us some discovery, but at the same time, they

23 also asserted objections as to executive privilege

24 and deliberative process in answering our questions.

25 They did not give us any information about what role,

1 if any, independent individuals, private individuals  
2 played in the deliberations of the task force.

3 QUESTION: Could you just embellish your  
4 answer to Justice Stevens' question a little bit?  
5 And that is, if you, if you get some discovery, and  
6 you win your case, what do you get when you win that  
7 you will not already have gotten by the discovery?

8 MR. ORFANEDES: I guess I just want to --  
9 is this as a comparison to the discovery that, that  
10 was ordered?

11 QUESTION: Whatever the discovery is.  
12 Whatever the discovery is. You got enough discovery  
13 to win your case, you win it. What do you get then  
14 besides a statement saying they were wrong, you win.

15 MR. ORFANEDES: If discovery is limited to  
16 the narrowing that the appellate court suggested,  
17 none of that information, I believe, would be  
18 something that we would get under the statute if we  
19 were to win. Under the statute, we are entitled to  
20 basically the documents of the committee as limited  
21 by any properly applied exemptions of FOIA.

22 QUESTION: You are saying you get more  
23 discovery?

24 MR. ORFANEDES: I wouldn't -- no, we don't  
25 get more discovery.

1                   QUESTION: What are these documents that  
2 you would get that you would not already have gotten  
3 at the discovery stage?

4                   MR. ORFANEDES: Well, the documents the  
5 appellate court was talking about, and in addition to  
6 interrogatories which we don't get -- and actually,  
7 at one point the Government actually suggested that  
8 discovery take place on the basis of interrogatories.  
9 We wouldn't get any interrogatory answers.

10                  QUESTION: So you would get documents?

11                  MR. ORFANEDES: We would get documents.

12                  QUESTION: And what documents would you  
13 get?

14                  MR. ORFANEDES: We would get, I believe  
15 the statute allows disclosure of all of the documents  
16 of the task force subject to the limitations of FOIA.  
17 The documents are produced as if the task force was  
18 an agency subject to FOIA, and all the exemptions  
19 that FOIA applies, I believe, apply to these  
20 documents.

21                  QUESTION: So you'd get a broad disclosure  
22 is what you are saying?

23                  MR. ORFANEDES: That's right. I think the  
24 discovery as suggested or as narrowed by the  
25 appellate court is a much smaller subset of the

1 information we would get if we were entitled to -- if  
2 we ultimately prevail on the merits of the lawsuit.

3           There has been a couple of statements with  
4 respect to our complaint being based on nothing more  
5 than mere unsupported allegations. That is a false  
6 statement, in our view. In order to support our  
7 claims, we are relying first and -- first and  
8 foremost on the statement in the memorandum creating  
9 the document that says the Vice President has  
10 discretion to create subordinate working groups.

11           Then we also attach several statements,  
12 acknowledgments by the Government, that describe  
13 meetings between task force representatives and  
14 representatives of Enron and representatives of other  
15 working groups. I believe the Government itself  
16 acknowledged there were at least five such meetings.  
17 We know that the Vice President met with the chairman  
18 of Enron, Ken Lay. The Vice President himself in an  
19 interview he gave on Nightline said we met with all  
20 kinds of folks, we met with energy groups, we met  
21 with environmental groups --

22           QUESTION: When does that -- I don't see  
23 how that's --

24           QUESTION: What does that prove?

25           MR. ORFANEDES: The point is that this

1 shows the involvement of outside --

2 QUESTION: They talked to a lot of people,  
3 got a lot of advice, but does that make them de facto  
4 members of the committee?

5 MR. ORFANEDES: Well, that's the question  
6 that we are seeking to answer through our discovery.  
7 The point is that this is not an unsupported, these  
8 are not mere unsupported allegations.

9 QUESTION: Well, I'm not sure that's  
10 right. Just because you said they talked to a lot of  
11 people doesn't really prove anything, it doesn't seem  
12 to me.

13 MR. ORFANEDES: Well, if you put that  
14 together, the allegations of the individuals that  
15 were met with, with the statement in the memorandum  
16 that allows the Vice President discretion to create  
17 working groups, we think it does at least raise a  
18 significant question as to whether outside  
19 individuals were participating in these working  
20 groups and participating in the committee as a whole.

21 In any event, the District Court firmly  
22 believes that it needed this discovery in order to  
23 answer these questions. I see my time is up.

24 QUESTION: Yes. Thank you, Mr. Orfanedes.  
25 General Olson, you have five minutes left.



1 REBUTTAL ARGUMENT OF THEODORE B. OLSON

2 ON BEHALF OF PETITIONERS

3 QUESTION: General Olson, I hope you'll  
4 address the point whether you'll, whether you'll have  
5 to disclose anything more at the end of the suit than  
6 you will under the discovery. Is there a big  
7 difference between what they get under the discovery  
8 order and what they would get if they win the suit?

9 GENERAL OLSON: Thank you, Justice Scalia.  
10 I was going to address that point because it's been  
11 addressed by Justice Souter, Justice Stevens, Justice  
12 Kennedy. What the discovery -- and I don't have time  
13 to read the interrogatories or the requests for  
14 admissions, but those require the production of all  
15 information with respect to any contacts at all  
16 between any member of the task force or any  
17 government employee that assisted with it or any  
18 agency --

19 QUESTION: Overall within the scope of the  
20 order that the District Court gave?

21 GENERAL OLSON: Yes. Those were the  
22 discovery and requests for admissions. Now, the  
23 Court of Appeals didn't refine that. It said that,  
24 well, that's pretty broad, and it should be narrowed  
25 down, but it should be whatever is necessary to prove

1     their case.

2                     They thought what was necessary to prove  
3     their case was to have all outside contacts. FACA  
4     does not require the production of that degree or  
5     that scope of documents. It has to do with minutes  
6     and drafts and things that were actually considered  
7     by the committee. So the discovery is vastly broader  
8     than the relief that would be available if FACA  
9     existed. Secondly --

10                    QUESTION: General Olson, I thought that  
11     the, what the Court of Appeals said is there could be  
12     discovery on two issues. And one was what  
13     non-Federal offices participated, and two, to what  
14     extent. Judge Tattle and Judge Edwards were both  
15     pretty clear on that, that that would be the nature  
16     of the discovery permissible.

17                    MR. ORFANEDES: Well, of course. But  
18     that's exactly what those requests for admissions in  
19     those interrogatories seek. All contacts between any  
20     member of the committee or any other government  
21     employee and any outside person. And then what Judge  
22     Tattle and what -- went on to say at page 18-A, that  
23     is to say the discovery they need to prove their  
24     case.

25                    QUESTION: The point is it's different,

1 isn't it?

2 GENERAL OLSON: It's --

3 QUESTION: They want stuff on discovery  
4 that has to do with who said what to who. And if  
5 they win, they get a different set of things which  
6 are the documents of agendas, et cetera.

7 GENERAL OLSON: Well, it's --

8 QUESTION: Is that right?

9 GENERAL OLSON: It's different, but it --  
10 everything that they have asked for in those requests  
11 for admissions and those interrogatories, Justice  
12 Breyer, include everything they would get under FACA  
13 and a whole lot more. So -- and there is no question  
14 about that.

15 Now, with respect to the subordinate  
16 working groups, a point was made with respect to the  
17 President's directive, that the President said the  
18 Vice President may establish subordinate working  
19 groups to assist. The declaration that's in the file  
20 at page 240 of the Joint Appendix specifically says  
21 that the Vice President authorized that, but the Vice  
22 President did not establish any such subordinate  
23 working groups.

24 And then the declaration goes on to say  
25 that there was only a public citizen that was

1 involved in developing graphics and that sort of  
2 thing. And that was the only person that was  
3 involved. No such individuals, the individuals named  
4 in the litigation, participated in the working group  
5 formulation.

6           What we are saying here is that the  
7 constitutional immunity from discovery that we are  
8 talking about here is rooted in the overriding  
9 presumption of regularity, which, if repealed in this  
10 case, would repeal -- if overridden in this case  
11 would repeal the exemption under FACA for all  
12 government working groups.

13           And these are exclusive functions,  
14 textually committed to the President of the United  
15 States getting opinions from his subordinates. As  
16 your question suggested, Justice Breyer, virtually  
17 anything that the President might do, asking the  
18 Attorney General or the Assistant Attorney General  
19 for this or that to formulate something, and they go  
20 out to talk to people, that could be a -- that would  
21 be a FACA lawsuit in a heartbeat.

22           There is no statute that creates the right  
23 that the Petitioners seek here. There is no, there  
24 is no cause of action under FACA, and there is, no,  
25 Justice Stevens, no clear remedy, no clear right to

1   which they are entitled to ministerial duty and  
2   therefore a remedy. And they just jumped over the  
3   fact that the statute didn't give them the right to  
4   bring this case and brought it in the form of  
5   mandamus.

6                   Mandamus is no substitute. It's not  
7   appropriate here. It's a pure circumvention of the  
8   statute. There is, we submit, no such thing as a de  
9   facto member of an advisory group under FACA. FACA  
10   was intended to address the creation of de jure  
11   working groups where the President would cloak  
12   himself in the benefit of public citizens who have  
13   come up with this proposal. It's not, I think your  
14   question, Justice Breyer, it's not a FOIA case. It's  
15   not a --

16                   CHIEF JUSTICE REHNQUIST: Thank you,  
17   General Olson. The case is submitted.

18                   (Whereupon, at 11:01 a.m., the case in the  
19   above-entitled matter was submitted.)

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